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11 Attorneys for Defendant  
GOOGLE INC.

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15 ORACLE AMERICA, INC.,

16 Plaintiffs,

17 v.

18 GOOGLE INC.,

19 Defendant.

Case No. 3:10-cv-03561 WHA

**GOOGLE'S RESPONSE RE: OPENJDK**

Trial: May 9, 2016  
Dept.: Courtroom 8, 19<sup>th</sup> Fl.  
Judge: Hon. William Alsup

1 The Court ordered that any motion regarding opening the door to Google's 2015  
2 implementation of OpenJDK be filed by May 15, 2016 at 11:00 p.m. Oracle has opened the door  
3 to such evidence by arguing that Google has continuously – to the present day – acted willfully  
4 and in bad faith. However, Google plans to rest its case tomorrow, and at this stage of the trial,  
5 Google's options are limited. Google believes that the most appropriate step is for the Court to  
6 instruct the jury regarding the history of this case. Google incorporates its Response to the  
7 Proposed Statement to the Jury Regarding the First Trial and Appeal, ECF 1884, and its Response  
8 re Law of the Case and Willfulness, ECF 1896. If the Court elects not to instruct the jury about  
9 the history of the case, Google reserves its request for leave to introduce evidence of the 2015  
10 OpenJDK implementation as part of its rebuttal case. In addition, in the event that Oracle argues  
11 that it was not technically feasible for Google to use OpenJDK, or otherwise further opens the  
12 door, Google reserves the right to seek an appropriate remedy at that time.

13 During the course of its opening statement and its cross-examination of Google's  
14 witnesses, Oracle repeatedly asserted that Google has continuously acted in bad faith, up to the  
15 present day. Oracle is misleading the jury by portraying Google as cavalier and defiant based on  
16 a choice not to implement a non-infringing alternative notwithstanding this case's long and  
17 winding road. *See e.g.*, Oracle's Open Statement, Tr. 277:1-4 ("And even worse than that, ladies  
18 and gentlemen, Google kept coming out with new what they call flavors. New versions of  
19 Android, **each time using these APIs**, even though they knew that they shouldn't be doing that."  
20 (emphasis added)).

21 The most appropriate way to mitigate Oracle's misleading statements is for the Court to  
22 instruct the jury regarding the history of this case. Google plans to rest its case-in-chief  
23 tomorrow. Given that the witnesses to date have testified without referring to Android N's  
24 implementation of OpenJDK, Google believes that introduction of any such evidence at this  
25 juncture would confuse the jury. However, for the reasons laid out in its Response to the  
26 Proposed Statement to the Jury Regarding the First Trial and Appeal, Google submits that an  
27 instruction to the jury about the history of the case will lessen the impact of Oracle's misleading  
28 suggestions that Google has acted with ongoing willfulness and bad faith based on Google's

1 supposed continued improper use of the 37 Java SE API packages in Android. An instruction  
2 regarding the history of the case will provide the jury with important context as it considers the  
3 parties' conduct over the duration of this litigation.

4 If the Court elects not to instruct the jury regarding the case's history, then Google  
5 reserves its right to request leave to present evidence of its OpenJDK implementation. Google  
6 would anticipate presenting such evidence via a short examination of a percipient witness during  
7 its rebuttal case.

8 Additionally, Google reserves its right to request leave to present evidence of its  
9 OpenJDK implementation if Oracle argues that it was not technically feasible for Google to use  
10 OpenJDK, or changes its arguments about OpenJDK along similar lines. For example, if Oracle  
11 argues that it was not technically possible for Google to use OpenJDK, then Google may need to  
12 refute this contention by putting on evidence of its OpenJDK implementation. Again, Google  
13 anticipates it would need a short witness examination in its rebuttal case.

14 Finally, Google does not understand the Court to be asking for the parties' positions about  
15 the use of evidence of OpenJDK in a possible damages phase, and Google does not address herein  
16 a possible damages phase. Google reserves all rights with respect to evidence of OpenJDK for  
17 use in a damages phase, if such a phase occurs.

18  
19 Dated: May 15, 2016

KEKER & VAN NEST LLP

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21 By: /s/ Robert A. Van Nest

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